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STRIKER PROTECTION ACT

MAY 9, 1991.—Ordered to be printed

Mr. ROE, from the Committee on Public Works and Transportation, submitted the following

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REPORT

together with

MINORITY VIEWS

[To accompany H.R. 5 which on January 3, 1991, was referred jointly to the Committee on Education and Labor, the Committee on Energy and Commerce, and the Committee on Public Works and Transportation]

[Including cost estimate of the Congressional Budget Office]

The Committee on Public Works and Transportation, to whom was referred the bill (H.R. 5) to amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment (stated in terms of the page and line numbers of the introduced bill) is as follows:

Page 3, strike line 22 and all that follows through line 14 on page 4 and insert the following:

"(b) No carrier, or officer or agent of the carrier, shall—

"(1) offer or grant the status of a permanent replacement employee to an individual for performing work in a craft or class for the carrier during a dispute which involves the craft or class and which is between the carrier and the labor organization that is acting as the collective bargaining representative involved in the dispute; or

"(2) offer or grant an individual any other employment preference based on the fact that such individual performed work in a craft or class, or indicated a will-

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ingness to perform such work, during a dispute over an individual who—

"(A) was an employee of the carrier at the commencement of the dispute;

"(B) in connection with such dispute has exercised the right to join, to organize, to assist in organizing, or to bargain collectively through the labor organization that is acting as the collective bargaining representative involved in the dispute; and

"(C) is working for, or has unconditionally offered to return to work for, the carrier.".

The reported bill protects an important right which has been guaranteed to American workers for more than 50 years: the right of employees to strike when they are unable to reach a collective bargaining agreement with an employer. In recent years, the right to strike has been undermined by employers who have refused to let striking workers return to their jobs after a strike has been settled. These employers have filled the strikers' jobs with newly hired replacement workers and with employees who crossed the picket line and worked during the strike. The Committee believes that these actions by management have significantly impaired the value of the right to strike, which is a critical part of the balanced scheme of economic weapons which our labor laws grant to management and employees. To redress the balance, H.R. 5 gives employees engaging in a strike permitted under the Railway Labor Act the right to return to their jobs when the stike is over.

BACKGROUND

The Committee on Public Works and Transportation has jurisdiction over Section 2 of H.R. 5, which amends the Railway Labor Act, the law governing labor relations in the airline industry. The Railway Labor Act guarantees airline employees the right to select representatives for collective bargaining. When a representative has been selected, the Act prohibits "self-help" by either management or labor, such as employee strikes or employer lockouts, until efforts to reach a collective bargaining agreement have clearly failed. The procedures which may be required before a strike or lockout is permitted include mediation efforts by the National Mediation Board, which may go on for many months. When collective bargaining and mediation have failed to produce an agreement, employees have the right to strike and the employer has the right to take appropriate forms of self-help, including compensating employees on the basis of the employer's last offer.

The right to strike is critical to the scheme of labor relations prescribed by the Railway Labor Act. As the Supreme Court has stated:

> [E]mployees subject to the Railway Labor Act enjoy the right to engage in primary strikes over major disputes * * * whether the source of this right may be found in a particular provision of the Railway Labor Act, or in the scheme as a whole, it is integral to the Act.

> *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 at 384-385 (1969).

Although the courts have also held that the right to strike protects an employee from being discharged for participating in a strike, the courts have also held that employer has the right to permanently replace striking employees. The right of employers, known as the "Mackay rule," was first described by the Supreme Court as follows:

> [It is not] an unfair labor practice [for an employer] to replace * * * striking employees with others in an effort to carry on the business * * * and [the employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [an employer] to those who have accepted employment during the strike that if they so desire their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. (*NLRB* v. *Mackay Radio Co.*, 304 U.S. 333 at 345 (1938))

The courts have held that the Mackay rule also applies to the Railway Labor Act. In addition, in the case of *Trans World Airways, Inc.* v. *Independent Federal of Flight Attendants*, 489 U.S. 426 (1989), the Supreme Court held that under the Railway Labor Act an employer is nor required to lay off junior employees who have returned to work during a strike, in order to reinstate more senior full-term strikers at the conclusion of a strike.

Although the Mackay rule allowing the hiring of permanent replacements during a strike has been in effect for more than 50 years, employers in the airline industry did not exercise this right until the 1980s. An important event encouraging employers to hire permanent replacements was President Reagan's 1981 decision to permanently replace striking air traffic controllers. In addition, the 1980s wave of mergers and leveraged buyouts left some airlines in the hands of anti-union owners, who desperately needed to increase cash flow to meet the high interest costs resulting from the merger or buyout. These factors led to a dramatic change in the approach of some airlines to labor relations. Since 1981, there have been seven strikes in the airlines industry, and in five of these strikes, permanent replacements have been hired.* These five strikes resulted in the hiring of more than 16,000 permanent replacements.

Need for Legislation

It is clear to the Committee that the right to strike is severely diminished, if not eliminated, when employers are permitted to permanently replace strikers. The courts have recognized that the right to strike would be meaningless if employers could be discharged for striking. We see no logical basis for prohibiting the discharge of strikers but permitting strikers to be permanently re-

*Permanent replacements were hired in the following strikes: Continental Airlines (1985), Alaska Airlines (1985), United Airlines (1985), TWA (1986), and Eastern (1988).

placed. The illogic of this distinction has been noted by many scholarly observers, and it is obvious even to their students. As Professor William B. Gould of Stanford Law School has related:

> Every year when I teach my students about the rules relating to the strike weapon in Labor Law, I, I always explain the practical significance of engaging in protected activity. I point out to them that the practical significance is that the employee is immunized from employer self help instituted against [workers] in the form of discipline or discharge for engaging in the conduct in question. But then I tell them that despite the fact that workers cannot be discharged or disciplined for engaging in a strike, they can be permanently replaced. Either this produces nervous laughter or expression of puzzlement—and well it should! [W.B. Gould, "The Permanent Replacement of Strikers," A Speech for the United States Department of Labor Symposium On Vital Issues and New Directions in Labor Management Relations (May 17, 1988), at 8–9].

The same conclusion has been reached by those directly involved in the collective bargaining process. Testimony by employee representatives at the Aviation Subcommittee's hearing on H.R. 5 convincingly described the chilling effects of employers exercising their right to hire permanent replacements:

> I ask you: if an employee cannot return to his job after the end of a legal strike because someone hired during a strike has permanently replaced him, is he not just as unemployed as if he had been fired? The end result is the same: he has no job and he has no paycheck. (Testimony of Capt. J. Randolph Babbitt, President, Air Line Pilots Association)
>
> Although the fight was valiant and flight attendant support was strong—with 85% of the workforce still honoring the picket line after 72 days—the union made an unconditional offer to return to work when it became clear that the corporate goal was the wholesale replacement of the workforce. (Testimony of Vicki Frankovich, President, Independent Federation of Flight Attendants)
>
> In 1976, our members at Alaska Airlines were forced to go on strike. 23 days into the strike, flight attendants received the first letter from management threatening that striking flight attendants would be permanently replaced. * * * [After] realizing that the flight attendants could be replaced legally, [we] signed a back to work agreement two days later. * * * The most significant effect of the threat of permanent replacement workers was that it gave the company the upper hand. Flight attendants feared losing their jobs and quickly returned to work. (Testimony of Juliette D. Lenior, National Vice President, Association of Flight Attendants, AFL–CIO)

In the hands of an anti-union employer, the right to hire permanent replacements is more than a defensive weapon against strikes. It is an offensive weapon to destroy unions. The anti-union employ-

er can take a hard line in bargaining, force a strike, and then hire permanent replacements who are anti-union. Although the Railway Labor Act does not have procedures for decertifying a union, a union will be effectively if the employees in the craft the union represents do not want to be represented by it.

In addition, the hiring of permanent replacements serves to prolong labor disputes and increase the difficulties of returning to normal after a strike. The hiring of permanent replacements converts a dispute over terms of employment (wages, benefits, and work rules) to a necessarily bitter dispute over the future of the employees' jobs and their union. Even if an agreement can be reached, tension between former strikers and permanent replacements can poison the working environment for years.

For these reasons, the Committee has concluded that the recent activation of the right to hire permanent replacements has destroyed employee rights which are important parts of the balance of economic power in the collective bargaining process. H.R. 5 will restore the balance by providing that striking workers may not be permanently replaced, either by new hires or by cross-over workers who have less seniority than a striker. The passage of H.R. 5 will restore the status quo which existed in the airline for forty years, before employers began to use their right to hire permanent replacements.

The Committee finds the arguments which have been raised against H.R. are unpersuasive.

Some opponents of H.R. 5 suggested that the right to hire permanent replacements would not destroy the right to strike because, under the Mackay doctrine, strikers who do not get their jobs back after a strike retain a preferential right to be hired for vacancies which arise in the future. Experience in the airline industry suggests that this right to preferential rehire is often illusory. Capt. Babbitt, the President of the Air Line Pilots Association, testified that although he was a senior captain at Eastern Airlines and number 62 on the recall list to go back to work, he had not been recalled when the company ceased operations more than one year after the pilots' sympathy strike ended. George Leitz, International President of Transport Workers Union testified that in the Eastern strike 4,500 flight attendants, of the 6,000 who went on strike, had not been rehired when the company shut down. Vicki Frankovich, President of the Independent Federation of Flight Attendants, testified that in the TWA strike it took more than three years before the last striker was returned to their job. Ms. Frankovich also pointed out the serious problems which are created by allowing permanent replacements and cross-overs to take the jobs of strikers.

> As you can well imagine, the level of animosity and hostility in the cabin between strikers and scabs was clearly evident to the passengers. The traveling public suffered, the airline suffered, and the employees suffered. Such an atmosphere prevents the open communication and spirit of cooperation needed to provide for the safety and service of airline passengers.

Another argument raised in opposition to H.R. 5 was that if the bill is enacted, strikes will become rampant. A representative statement of this point of view was the testimony of Professor David Westfall of Harvard Law School that:

> [If H.R. 5 were enacted] employees would be free to strike repeatedly no matter how excessive their demands were in relation to prevailing market wage rates, knowing that their jobs would always be waiting for them, unless and until their employer eliminated the jobs or went out of business.

The Committee views this assessment of the situation as unrealistic and not in touch with workplace realities. If H.R. 5 were enacted, there would still be substantial pressures on employees to refrain from striking or to conclude a strike as quickly as possible. During a strike employees lose income and other benefits and may have to exhaust their savings to pay mortgages and other continuing obligations. These losses can never be recovered. Strikes also impose great emotional strain on families, friendships and the fiber of local community lives.

Adding to the pressure on employees to refrain from striking is the ability of many companies to sustain an extended strike. Neither the Railway Labor Act nor H.R. 5 prevent the employer from continuing to operate during a strike by hiring temporary replacements, encouraging employees to cross picket lines, using management personnel to temporarily do the work of strikers, or curtailing operations. Depending on the type of work done by the employees who go on strike and general economic conditions, there will be many instances in which it would be feasible for an airline company to continue operating during a strike. Even if an airline would not be able to operate during a strike, striking employees run the risk that the shutdown will do irreparable damage to the company, and that their jobs will be lost. In the airline industry, an employee who must find a job with a new company is likely to suffer a substantial loss of pay because he or she must start the new job at the bottom of the seniority scale. Also, the costs of relocation to a new job can be substantial.

For these reasons, the union representatives testifying on the bill stated, convincingly, that airline employees do not relish strikes and refrain from them if at all possible. This would not change under H.R. 5, since the significant economic costs and risks to employees who go on strike would remain untouched.

It has also been suggested that H.R. 5, as amended by the Committee, discriminates against non-union employees because the bill only grants strikers the rights to return to their job when a strike has been sanctioned by a collective bargaining representative selected by employees. We failed to see the discrimination which is claimed. Under the bill, when there is a strike authorized by a collective bargaining representative selected by the employees, all employees who participate in the strike are protected by H.R. 5, whether these employees are members of a union or not. H.R. 5 follows the same scheme as the Railway Labor Act and protects employees who engage in strikes which are authorized by that Act. As discussed above, the RLA permits strikes only in very limited cir-

cumstances, to protect the public against interruption of vital transportation services. There has been no showing that it would be desirable to depart from the scheme of the RLA to protect strikers under H.R. 5.

Opponents of H.R. 5 have also argued that H.R. 5 gives striking employees who engage in violence the right to get their jobs back after a strike. As was pointed out at the Committee's markup of the bill, this contention ignores the fat that under the Railway Labor Act, an employee who engages in violence during a strike can be discharged by the employer and has no rights to his job back after a strike. H.R. 5 does not infringe the rights of employers to discharge employees engaging in violence.

In sum, the Committee believes that H.R. 5, as amended, is necessary to restore the balance between management and labor in airline labor relations and protect the important right of airline employees to strike when collective bargaining has failed.

Section-by-Section Summary

Section 1. This section amends section 8(a) of the National Labor Relations Act to make it an unfair labor practice for an employer to:

(1) offer or grant the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute or

(2) to otherwise offer or grant an individual any employement preference based on the fact that such individual was employed or indicated a willingness to be employed during a labor dispute over an individual who:

a. was an employee of the employer at the commencement of the dispute:

b. has exercised the right to join, assist, or engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and

c. is working for or has unconditionally offered to return to work for the employer.

Section 2. Amends the Railway Labor act to prohibit a carrier from:

(1) offering or granting the status of permanent replacement employee to an individual for performing work in a craft or class during a dispute which involves the craft or class between the carrier and the labor organization that is acting as the collective bargaining representative involved in the dispute or,

(2) offering and granting an individual any other employement preference based on the fact that such individual performed work in a craft or class or indicated a willingness to perform such work during a dispute over an individual who

(a) was an employee of the carrier at the commencement of the dispute;

(b) in connection with such dispute, has exercised the right to join, organize, assist in organizing, or bargain collectively through the labor organization that is acting as

the collective bargaining representative involved in the dispute; and

(c) is working for or has unconditionally offered to return to work for the carrier.

COMMITTEE ACTION AND VOTE

With respect to clause 2(l)(2) (a) and (b) of rule XI of the Rules of the House of Representatives, the Committee, with a majority present favorably reported H.R. 5, as amended, by voice vote on April 16, 1991.

OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the Subcommittee on Investigations Oversight has held no hearings on the subject of H.R. 5.

With respect to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has not received a report from the Committee on Government Operations pertaining to the subject matter of the legislation.

CONGRESSIONAL BUDGET ACT REQUIREMENTS

With respect to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, and section 308(a) of the Congressional Budget Act of 1974, a section 308(l) report is not required because H.R. 5, as amended, does not provide any new budget authority and no new or increased tax expenditures.

With respect to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the following report has been received from the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 22, 1991.

Hon. ROBERT A. ROE,
Chairman, Committee on Public Works and Transportation,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5, as ordered reported by the Committee on Public Works and Transportation on April 16, 1991. CBO estimates that enactment of H.R. 5 would not increase the federal budget and would not have any pay-as-you-go implications under section 252 of the Budget Enforcement Act of 1990. This bill would not affect the budgets of state and local governments.

H.R. 5 would amend the National Labor Relations Act and the Railway Labor Act to expand the definition of unfair labor practices. This bill would prohibit employers and rail carriers subject to the Railway Labor Act from granting the status of permanent replacement employee to individuals who performed work for the employer during a labor dispute. In addition, H.R. 5 would prohibit

employers or rail carriers from giving preference to employees who worked during a labor dispute over employees who did not.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cory Oltman (226–2820).

Sincerely,

ROBERT D. REISCHAUER,
Director.

INFLATIONARY IMPACT ANALYSIS

With respect to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee reports that there should be no inflationary impact on prices and costs in the operation of the national economy by enactment of H.R. 5, as amended.

COST ESTIMATE OF LEGISLATION

With respect to clause 7(A)(1) of rule XIII of the Rules of the House of Representatives, the Committee concurs in the cost estimate submitted by the Congressional Budget Office.

With respect to clause 7(A)(2) of rule XIII of the Rules of the House of Representatives, the Committee reports that no cost estimate of H.R. 5 was submitted to the Committee by a government agency.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 8 OF THE NATIONAL LABOR RELATIONS ACT

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) * * *

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)[.]; *or*

(6)(i) to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute, or

(ii) to otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who—

(A) was an employee of the employer at the commencement of the dispute;

(B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and

(C) is working for, or has unconditionally offered to return to work for, the employer.

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SECTION 2 OF THE RAILWAY LABOR ACT

GENERAL PURPOSES

SEC. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. * * *

* * * * * * *

Fourth. (*a*) Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

(b) No carrier, or officer or agent of the carrier, shall—

(1) offer or grant the status of a permanent replacement employee to an individual for performing work in a craft or class for the carrier during a dispute which involves the craft or class and which is between the carrier and the labor organiza-

tion that is acting as the collective bargaining representative involved in the dispute; or

(2) offer or grant an individual any other employment preference based on the fact that such individual performed work in a craft or class, or indicated a willingness to perform such work, during a dispute over an individual who—

(A) was an employee of the carrier at the commencement of the dispute;

(B) in connection with such dispute has exercised the right to join, to organize, to assist in organizing, or to bargain collectively through the labor organization that is acting as the collective bargaining representative involved in the dispute; and

(C) is working for, or has unconditionally offered to return to work for, the carrier.

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MINORITY VIEWS OF JOHN PAUL HAMMERSCHMIDT, BILL CLINGER, RON PACKARD, JIM INHOFE, CASS BALLENGER, FRED UPTON, MEL HANCOCK, CHRISTOPHER COX, SUSAN MOLINARI, FRANK RIGGS, DICK NICHOLS, AND WILLIAM ZELIFF

GENERAL CONSIDERATIONS

For more than 50 years, labor and management have worked together under the principles set forth by the Supreme Court in *National Labor Relations Board* v. *Mackay Radio & Telegraph Company,* 304 U.S. 333 (1938). That case recognized that businesses often need to keep operating during a strike and could do so by permanently replacing workers who strike for economic reasons.

On the whole, this system has worked well. The vast majority of disputes have been resolved through negotiation without having to resort to strikes.

The system worked because the law struck the proper balance between management and labor. It gave employees the right to strike and it gave employers the right to hire replacements in order to keep operating during the strike. Conversely, the law also established another balance, the balance of cost. Employees engaging in a strike do so with the clear understanding that they may suffer personal financial losses. A company subjected to a strike suffers as well from lost productivity, lost profits, disruptions in orders, and possible lost business as customers turn to alternative suppliers.

Now, armed with a few problem cases, the union leadership in this country is attempting to upset this balance. H.R. 5 so grossly tilts the balance of power in the hands of labor, that if used recklessly, labor will initially win hollow victories for higher wages and benefits, but later pay for these excesses through lost jobs as more and more of our industrial base moves off shore.

Before discussing particular criticisms of the bill, we hasten to add that Republican Members of this Committee have been supportive of labor. On a variety of economic and safety issues such as airline labor protective provisions, flight attendant duty time limitations, cabin safety, smoking on board aircraft, many of us have advocated labor's position. Our commitment to the working people of America is clear.

However, this bill presents a different situation. While our commitment to the American workers remains the same, our approach is to maintain the status quo because, in the final analysis, it is in the best interest of the worker.

We do not believe that the solution is to upset the current balance between management and labor. In our view, the system that has been in place since the Supreme Court's *Mackay* decision of 1938 has benefitted all sides and must be preserved.

Since 1938, the American economy has grown dramatically. This has been good for all, both employers and employees. Both groups have seen their standard of living and productivity greatly improve since 1938. Indeed, our economy is the envy of the world.

If the *Mackay* decision has been as detrimental to labor's interests as proponents of this legislation contend, we would not have seen such widespread benefits from our economic prosperity. And it cannot be argued that the harm is not yet apparent because the use of the *Mackay* doctrine by management is a recent phenomena. In fact, although there were a few well-publicized cases in the eighties, testimony at the hearing demonstrated that management has invoked the *Mackay* doctrine and replaced strikers more frequently before 1980 than after. So while it is clear the *Mackay* decision has not hurt the American worker generally, upsetting that doctrine would do so.

Changing the law now would overturn the delicate balance under which labor can strike and management can continue operating during a strike. It would mean that employees would have much less incentive to bargain in good faith. They could go out on strike knowing full well that they will get their jobs back at any time regardless of the length of the strike.

Of course, the bill does not prevent employers from hiring temporary workers or from using supervisors during the strike. Nor does it explicitly require the employer to shut down during the work stoppage. However, that will be its practical impact. Without the right to hire permanent replacements, it will be virtually impossible for an employer to obtain an adequate labor force during a strike.

Potential replacements will be reluctant to take the job if they know that they could be fired at any time. Consequently, in most cases, business would be forced to either shut down immediately or capitulate to unreasonable demands and risk going out of business later.

The effect of this on all Americans will be negative. It will mean less labor peace, more strikes, more bankruptcies, and fewer jobs. It is likely to once again ignite the inflationary wage/price spiral that was largely broken in the eighties. And it will have an adverse impact on our international competitiveness and balance of trade. In short, enactment of this legislation will help export U.S. jobs overseas.

Airlines and their employees are likely to be hit particularly hard by this bill. The airlines have already lost billions of dollars during the past few months. They are reeling from the effects of war, recession, high fuel cost, and fears of terrorism. Eastern Airlines is out of business. Pan Am, Continental, and Midway are operating in bankruptcy. And TWA seems to be on the brink. Many have expressed fears that the airline industry is becoming too concentrated, leading to a lack of competition that will undermine the benefits that consumers have received thus far from airline deregulation.

As Secretary of Transportation Skinner pointed out, high labor costs, in addition to the factors mentioned above, are an important reason for the airlines' problems. Yet this bill will lead to even higher labor costs. Those who are concerned about competition in

the airline industry should therefore be focusing on the impact this bill will have on further concentration.

For these reasons we oppose this bill. But even if one did believe this legislation could somehow be helpful, there are so many glaring problems with it in its current form that it still warrants our vigourous opposition.

H.R. 5 MYTHS

The proponents make several arguments in support of this legislation that we believe are completely without foundation.

No Increase In Strikes

Incredibly, the proponents argue that H.R. 5 will not result in added labor disputes. If a worker does not risk permanent job loss what is to prevent that worker from striking for insignificant or unimportant reasons? And what's to prevent that striker from asking for unreasonable economic concessions or wage demands? And what is the incentive to bargain in good faith?

It defies logic to assume that we could not expect additional labor strife if H.R. 5 is enacted. Indeed, the experience in Canada has been a disaster. A recent study shows that there were large increases not only in strike incidence but also duration where employers could not hire permanent replacements. Canada's law along with a current 10.2 percent unemployment rate provides little comfort that H.R. 5 will work in the U.S.

Replacement Versus Firing

Another myth is that permanently replacing strikers is tantamount to firing them. In fact, however, a replaced striker is in a much different, and much better, position than a fired worker. Someone who is fired would be entitled only to:

(1) unemployment compensation in some cases; and

(2) health insurance in most cases.

Now let us look at the guaranteed rights of a permanently replaced striker:

(1) Preferential reinstatement upon vacancies with the struck employer to the same or a substantially equivalent position.

(2) Options to accept or refuse any job with the struck employer or another employer for which the worker is qualified without waiving rights to the worker's original position.

(3) Lifetime reinstatement rights with the struck employer based upon two preconditions: a) continued existence of the company or a successor, and b) the worker wants a job.

(4) No new hires by the struck employer until the preferential recall list is exhausted.

(5) Continued accrual of seniority with the struck employer.

(6) Preference over permanent replacements for recall from indefinite layoff.

(7) Continuation on the employer's preferential recall list even if the worker is fired from a lesser job for incompetence.

(8) Right to vote on all questions affecting the bargaining unit indefinitely (such as ratification of contract terms).

(9) Unemployment compensation in virtually all circumstances.

(10) Voluntary health insurance coverage through COBRA in all cases.

The key difference between replaced strikers and fired workers is the strikers preferential right to rehire. This is not a mere theoretical right. Indeed, in recent airline strikes, where the airline survived the strike, the vast majority of strikers who were replaced did in fact get their jobs back or were offered their old jobs. Granted, they did not always get them back immediately. But the decision to strike cannot be one without costs. In order to promote labor peace, there must be costs to both sides. Otherwise, there is no incentive to reach an agreement.

Unfair Practices by Management

Another focus is the horror stories about what management has done or may do to labor. We recognize that there may be much to criticize on both sides. However, workers are already protected in such situations. They do not need the additional protections of this bill.

Under current law, a striker can not be permanently replaced where management engages in unfair labor practices. So that should not even be a consideration here. Instead what we are considering in this legislation is the situation where employees strike for purely economic reasons and where management has not engaged in unfair labor practices.

In such situations, surveys show that a majority of the American people believe that management should be able to keep their business operating during the strike by hiring replacements and that those replacements should not be fired when the strike is over. We agree.

Union Busting

Another myth is that permanent replacements are used against unions in representation campaigns as a means of influencing nonunion workers. It can be argued that a fear of union representation will influence employees to vote against organizing. However, a ban on permanent replacements, while it may reduce this fear, would certainly not eliminate it. Employee fears of plant closure or curtailed production, in response to union demands or union contracts, would be more likely to influence election outcomes.

We emphasize that companies which provoke strikes in order to avoided bargaining with unions risk being found guilty of a refusal to bargain in good faith. If this is the case, then strikes are to be characterized as "unfair labor practice strikes" which guarantee full and complete reinstatement rights for strikers under existing law.

With respect to workers covered by the Railway Labor Act (RLA) hiring permanent replacements has no impact on union ouster. The National Mediation Board (NMB) does not recognize decertification procedure and, therefore, airline employers have no way to test continued support of the union. Also, as mentioned before, NMB gives the replaced striker the power to vote indefinitely even if a new union develops among replacement workers. Thus, the bargaining agent represents not only the replacement workers but also the striking employees.

Recent Use of Permanently Replacement Workers

The proponents of this legislation argue that in the 1940s through the 1970s there was no substantial evidence of permanent replacement of strikers. Testimony before the Committee indicates that this is clearly not the case. A study conducted by the Employment Policy Foundation found that the Mackay option was exercised by employers on numerous occasions before the 1980s. The study found that of the 251 cases involving Mackay replacements, all but 22 occurred prior to the 1980s. In other words, the use of Mackay replacements has remained at about the same level for the last 50 years.

In another study conducted by the General Accounting Office, it was shown that in 1985 and 1989 Mackay replacements were hired only in 17 percent of all strikes and, more significantly, this only affected 4 percent of all strikers in 1985 and 3 percent in 1989. These studies clearly indicate that there is not widespread use of the management strike weapon of hiring replacements.

Mackay And The Right To Strike

The charge that current law and practice undermine the right to strike totally ignores the underlying philosophy of this country's labor laws. Those laws are designed to produce labor peace. The policies that have been developed over the past 50 years do recognize that both sides must sometimes take certain measures in a labor dispute. While unions are entitled to strike, management is entitled to continuing to operate the business. But neither is absolute or unconditional. Proponents of the legislation ignore the fact that the right to strike must have risks and restrictions. Indeed, an unrestricted right to strike would encourage labor turmoil and make a strike more likely to occur whether justified or not thereby giving labor unions an unfair advantage.

If replacing strikers can sometimes be harsh so is the strike weapon. The employer must bear the cost of training an entire new work force, suffers from adverse publicly, and invites the possibilities of labor violence.

In the airline industry, it is especially difficult to find skilled pilots and mechanics to work on a temporary basis. Most are not likely to be willing to take a temporary job with a possibility of termination at any time. It is very likely that prohibiting replacement workers would give an employer only one option—shut the company down.

Under the Railway Labor Act, collective bargaining has worked remarkably well. Ninety-seven percent of all negotiations overseen by the National Mediation Board have resulted in settlements without strikes. The Railway Labor Act has a comprehensive bargaining structure, which encourages the parties to reach voluntary settlements through negotiations and government-sponsored mediation.

Clearly the use of striker replacements has not adversely effected the average airline employee's wages or bargaining power. Based on testimony before Congress, the average annual cash compensation for airlines pilots is $92,000, mechanics $37,000, and flight at-

tendants $26,000 plus benefits and retirement. This clearly indicates that H.R. 5 is not needed.

OTHER PROBLEMS

H.R. 5 Discriminates Against Non-union Workers

A major problem with the bill is its treatment of non-union workers. We are told that the author of the legislation did not intend for its protections to extend to the non-union employee. However, a clear reading of the introduced version indicates that the bill would apply to union and non-union workers alike.

In an attempt to clarify this situation, Congressman Sherwood Boehlert offered an amendment during Subcommittee markup which purports to restrict the application of the bill's protections to union employees. The amendment was adopted. We note that it is still far from clear what the impact of the bill, as amended, would be on non-union workers.

During markup, the author argued that the amendment makes the bill applicable only to dispute between a carrier and a labor organization acting as the collective bargaining representative. However, the effect of the amendment raises more questions than it answers. During markup it was admitted that the Boehlert amendment would apply in some instances to non-union employees.

It is apparent that proponents of the Boehlert amendment would have us believe that a "labor organization that is acting as a collective bargaining representative" is synonymous with a "union." But the law defines labor organization more broadly and does not define collective bargaining representative at all. Section 151 Sixth of the RLA implies that the representative could be a union, some other organization, or merely a person or persons designated by the employees.

Several cases have shown that where two or more employees (whether union or non-union) engage in concerted activity, they constitute a "labor organization." *NLRB* v. *Kennametal Inc.*, 182 F. 2d 817 (3rd Cir. 1950); *NLRB* v. *Jasper Seating Co., Inc.*, 857 F. 2d 419 (7th Cir. 1988). How it would be determined that a labor organization has become the "collective bargaining representative" or that it is acting on behalf of the employees is far from clear.

And even if these problems could be resolved, one must keep in mind that the amendment applies only to the air and rail industries. To the extent the problem exists, the amendment does not address most American industries.

However, we believe that if this bill were indeed a good one, its protections should apply without discrimination to all workers. It is important that all employees, whether union or non-union, be given equal protection under the law. That is a fundamental American right. It is also one of the underlying principles of labor law that individuals are protected equally in their decisions to act collectively or refrain from such actions.

Proponents of this legislation have justified it on the grounds that it is needed to protect individual strikers. But their support for the Boehlert amendment makes clear what their primary goal is—increasing the bargaining and organizing power of union leadership. By creating two different classes of workers for the pur-

poses of striker protection, they will have an advantage in organizing non-union workers. Unions will be able to offer a worker, in effect, a guaranteed job for life if that worker joins the union.

Union Violence

H.R. 5 would protect strikers even if they engaged in violence during the strike. While there are already laws against violence, it seems particularly inappropriate that persons who went to jail for violent crimes could, at the same time, be able to demand their jobs back.

This is especially true in the case of airline employees whose very jobs involve safety of persons and property. This Committee unfortunately lost an opportunity during consideration of this bill to take a strong stand against violence even though it was given several opportunities to do so during the amendment process. In our view, it is not unreasonable to require that a worker have "clean hands" before being able to avail himself of the protections of H.R. 5.

Secondary Boycotts

Another shortcoming of the bill is its failure to address the problem of secondary boycotts. Air and rail unions are unique among American labor. They have the legal right to shut down the businesses of neutral third parties throughout the country during a labor dispute. For all other workers in virtually every other industry, this so-called secondary activity is illegal and constitutes an unfair labor practice.

The reason for the disparate treatment of air and rail is the 1987 Supreme Court decision in *Burlington Northern Railroad* v. *Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987). This decision made it possible to bootstrap one-company controversies into industry-wide crises of national significance by threats of secondary picketing and boycotts against scores of other, neutral companies.

In the Burlington Northern case, the Supreme Court decided for the first time that Federal courts are prohibited from enjoining secondary picketing under the Railway Labor Act. The Court's ruling was based on the fact that, unlike the National Labor Relations Act (NLRA) which governs virtually all the rest of American labor, the Railway Labor Act (RLA) contains no express condemnation of specific secondary activities. Rather, the RLA is silent on the subject.

The Supreme Court noted that only because the RLA does not contain the same express provisions concerning secondary activity that are found in the NLRA do Federal anti-injunction provisions apply uniquely to secondary activity in the rail and airline industries.

The irony is that when Congress passed the RLA in 1926, secondary picketing was illegal and courts regularly enjoined it. As former Solicitor General Rex Lee has pointed out, "the drafters of the RLA did not need to insert express prohibition of secondary picketing because in 1926 Federal law clearly prohibited such picketing." In fact, just 5 years before the enactment of the RLA, the

Supreme Court itself had held that even the anti-injunction provisions of the Clayton Act did not prevent the courts from enjoining secondary activity. "Congress," the Supreme Court said, "had in mind [the protection of] particular industrial controversies, not a general class war" that would result from secondary picketing.

The Supreme Court in its *Burlington Northern* decision made clear that Congressional guidance would be welcome to redress this anomaly. We regret that when given the opportunity to provide such guidance in this bill, the Committee failed to do so. This failure means that those who engage in secondary activities will receive the benefits of this bill even though their conduct would have been considered illegal in any other industry. It also means that rail and airline unions will continue to possess the unprecedented power to shut down entire industries.

Conclusion

Despite a few well-publicized strikes, American industry generally, and the airline industry in particular, has developed a fine record of labor peace over the past few years. This record exists largely because each side faces significant losses if a strike occurs. Business risks permanently lost markets and revenues. Labor risks jobs if the employer is forced to hire permanent replacements. With such threats facing each side, labor and management both have a strong incentive to reach a settlement.

Unfortunately, this legislation would destroy that balance. If enacted into law, the unions would be able to set their demands, threaten to strike, and leave the business with the choice of a devastating strike or an excessive wage settlement. By breaking the balance in labor-management relations, H.R. 5 will mean more labor disputes, more lost jobs, and higher prices and air fares. Ultimately, this will be harmful to the American economy, to all those associated with the airline industry, and to the American worker. We oppose this bill.

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